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NO. 82-322

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

CARMINE ROMANO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petitioner's Reply Brief

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PETITIONER'S REPLY BRIEF

POINT I

THE GOVERNMENT'S INTERPRETATION OF 18 U.S.C. 1954 FINDS NO SUPPORT IN THE LANGUAGE OF THE STATUTE OR IN ITS LEGISLATIVE HISTORY.

While the Government agrees that 18 U.S.C. 1954 is directed towards kickbacks and payoffs (Br. Opp. 6), it argues that the statute also seeks to punish the receipt of any conflict of interest payment. This mistaken view is based solely upon the isolated remark of one Senator, and is wholly at odds with the detailed legislative history which clearly evinces a Congressional effort to punish highly corrupt payments. (Pet. App. 9-11). Nothing in the legislative history suggests that Congress sought to turn every conflict of interest payment into a federal crime, and the Government's view to the contrary is also at odds with the general legislative scheme of imposing civil penalties on a pension fund trustee for a breach of a fiduciary responsibility. 29 U.S.C. 1109.

Second, while the Government agrees that customary business gifts are not embraced by the statute (Br. Opp. 7 n.5), and the Government does not deny that gifts-for-deposits on a nonpreferential basis is a customary and widespread practice in the banking world, the Government nevertheless contends that $10,000 worth of television sets is embraced by the statute. The $10,000 figure, if accurate, is seriously misleading because it represents the aggregate value of gifts alleged in many counts of the indictment. The issue here, as it was at the trial, is not whether $10,000 worth of customary gifts over a three-year period violates Section 1954, but whether *each gift* as alleged in the individual counts of the indictment violates Section 1954.*

Finally, although the Government agrees that under Section 1954 both the donor and the recipient of the gift are equally culpable, it argues that bankers would not be criminally liable for the widespread use of nonpreferential gifts-for-deposit unless they know the pension fund trustee intends to keep the gift for himself and not turn it over to the fund. (Br. Opp. 7 n.5). But such an interpretation is wholly at odds with the Government's theory of the prosecution in the courts below and with the facts of this case.

The evidence showed that of the seventeen television sets covered by various counts of the indictment, petitioner, according to bank records, received four. The remainder went to friends and business associates and petitioner was charged as an aider and abettor.

*The Government's approach to Section 1954 would also give it unfettered discretion to prosecute under 1954 because in its opinion an admittedly customary gift is worth too much.

Furthermore, the evidence showed that under the bank rules then extant, the fund could not receive the gifts, and the bank knew the gifts were going to fund trustees and employees or their designees. Indeed, because the statute punishes those who give gifts to influence pension-fund deposit decisions, and in practically all instances, as in this case, the bank will know the funds belong to a pension fund, it would be the rare case in which a banker would not be liable under the statute if the Second Circuit's interpretation is left to stand.*

In sum, the Government has made no showing that the widespread banking practice of gifts-for-deposits is embraced by Section 1954.

Respectfully submitted,

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*The Government's contention that the violation of Section 1954 was not the receipt of the gifts, but the later failure to turn them over to the fund (Br. Opp. 7 n.5), may spell out the crime of embezzlement under 18 U.S.C. 664. But this was not the charge in the indictment. In addition, turning petitioner's proper receipt of the television sets into a crime because of his *later* failure to deliver them to the pension fund, violates the principles of *U.S. v. Carbone*, 327 U.S. 633 (1943) and *Arroyo v. United States*, 359 U.S. 419 (1959).